Lim Tin v Yap Mooi Hee and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–945 OF 2003, W-02–365 OF 2004 AND W-02–1095 OF 2004
ZALEHA ZAHARI, SULONG MATJERAIE AND CLEMENT SKINNER JJCA
29 DECEMBER 2011

Family Law — Divorce — Appeal against ancillary orders — Maintenance payments — Wife and children — Division of matrimonial property — Orders by trial judge — Variation or setting aside orders — Whether trial judge right in making orders — Whether there was material change in circumstances to justify variation of orders

The parties were formally husband and wife and had two children from the said marriage. The appellant, the husband, was appealing against the decision of High Court in relation to ancillary orders as follows: (a) that the guardianship of the children was given to the appellant whilst care, custody and control to the respondent with reasonable access to the appellant; (b) that the appellant was to pay maintenance of RM2,000 per month for the children commencing on the month of October 2003; (c) that the appellant was to pay arrears of maintenance of RM54,000 to the respondent; (d) that the appellant was to transfer a house in Taman Rainbow, Kuala Lumpur (ie matrimonial home) to the respondent free from any encumbrances; (e) the appellant was to pay to the respondent: (i) the sum of RM242,117.70 being half of the sum of RM484,235.40 kept as fixed deposit in the name of the appellant; (ii) the sum of RM27,361.52 being half of the value of shares in the appellant's name; (iii) the sum of RM79,339.56 being half of the judgment sum of RM158,679.13 awarded to both of them by the Industrial Court; (iv) the sum of RM54,000 being half of the sum of RM108,000 being the proceeds after the sale of their matrimonial asset at Jalan Puchong, Kuala Lumpur; (v) the sum of RM9,000 being half of the proceeds of disposal of matrimonial asset known as Lot 4.44, Level 4, Wisma Central, Kuala Lumpur; (vi) the sum of RM16,300 being half of the gain arising from the disposal of matrimonial asset known as Lots 4.31, 4.32 and 4.33, Level 4, Wisma Central, Kuala Lumpur; and (vii) the sum of RM90,000 being half of the value of the car ie Mercedes Benz. In the course of the hearing, the respondent informed the court that she had agreed to forego the orders specified in paras (iv), (v), (vi) and (vii). The issues before this court was whether the trial judge was right in making the orders as the above and whether valid reasons or basis existed to warrant this court to interfere with the orders so made.

Held:

(1) By reason of the passage of time and events that had transpired, no useful

purpose would be served to disturb the order relating to guardianship, care, custody and control of the children by reason of the children having attained the age of majority (see para 10).

(2) There was clearly no valid reason or basis warranting this court to interfere with the quantum awarded as maintenance for the children during the period the children were under the petitioner wife's care, custody and control. The record showed that the respondent husband clearly was habitually in arrears of the maintenance orders issued by the court against him (see para 16).

(3) The respondent husband, as guardian, clearly continued to have an interest in the children's welfare even after they attained the age of majority. He had very properly as a responsible and dutiful parent met the educational expenses of the children at a time when they were financially incapable of meeting those expenses, but it must not be overlooked that the expenses were for the benefit and best interest of the children. If the maintenance payments (interim or otherwise) were too much of a burden on him, there were avenues open to the respondent husband to apply to vary those orders (see para 17).

(4) In answer to the divorce petition, the respondent husband did not object to the matrimonial home being transferred to the petitioner wife free from encumbrances. Further, the evidence on record showed that the respondent husband clearly had the means to redeem the said property which he had charged as security for the 1994 loan had he wanted to do so. He had fixed deposits amounting to RM484,235.40 registered in his name (see paras 27–28).

(5) The High Court order dated 15 September 2003 required the respondent husband to transfer the matrimonial home be to the wife free of all encumbrances. The respondent husband never took the position then that he was entitled to a half share of the property as it was acquired from his sole efforts. If the property had been transferred to the wife in 2003 as ordered, the question of what the property is worth today would not arise at all. The present day value of the house was therefore irrelevant to the order made in 2003 which the respondent husband had tried to frustrate by allowing the property to be put up for auction (see para 31).

(6) In relation to the monies in the fixed deposit accounts, there was no valid reason for this court to interfere with the learned High Court judge's decision on this issue and agreed with his reasoning in arriving at the decision which he did (see para 36).

(7) In relation to the half of RM54,723.05 representing investments made by the respondent husband in the stock market amounting

RM27,361.52, the respondent husband had not presented any argument as to why this order should be set aside. This order of the High Court was accordingly affirmed (see para 39).

(8) The learned judge in ordering half of the Industrial Court award granted in favour of the respondent husband to be paid to the petitioner wife did not take into consideration the fact that the petitioner wife herself was paid her compensation RM46,965.02 granted by the Industrial Court. In making a claim to a half share of the respondent husband's award, the amount which the petitioner wife herself received must necessarily be taken into account, and the total sum of the two Industrial Court awards be shared equally. The end result is that, the sum awarded to the petitioner wife in respect of this item was varied to a reduced sum of RM56,000 (see paras 42–43).

[Bahasa Malaysia summary

Pihak-pihak adalah sebelum ini suami dan isteri dan mempunyai dua orang anak hasil perkahwinan tersebut. Perayu, suami, merayu terhadap keputusan Mahkamah Tinggi berkaitan dengan perintah sampingan seperti berikut: (a) bahawa hak penjagaan anak-anak diberikan kepada perayu sementara jagaan dan kawalan diberikan kepada responden dengan hak lawatan yang munasabah kepada perayu; (b) bahawa perayu membayar nafkah RM2,000 sebulan kepada anak-anak bermula dari bulan Oktober 2003; (c) bahawa perayu membayar tunggakan nafkah sebanyak RM54,000 kepada responden; (d) perayu memindah milik rumah di Taman Rainbow, Kuala Lumpur (iaitu rumah perkahwinan) kepada responden tanpa beban; (e) perayu membayar kepada responden: (i) sejumlah RM242,117.70 iaitu separuh bahagian daripada jumlah RM484,235.40 yang disimpan sebagai simpanan tetap atas nama perayu; (ii) sejumlah RM27,361.52 iaitu separuh nilai saham atas nama perayu; (iii) sejumlah RM79,339.56 iaitu separuh daripada jumlah yang diawardkan sebanyak RM158,679.13 kepada kedua-dua mereka oleh Mahkamah Perusahaan; (iv) sejumlah RM54,000 iaitu separuh daripada jumlah RM108,000 sebagai hasil jualan harta perkahwinan di Jalan Puchong, Kuala Lumpur; (v) sejumlah RM9,000 sebagai separuh hasil pelupusan harta perkahwinan yang dikenali sebagai Lot 4.44, Level 4, Wisma Central, Kuala Lumpur; (vi) sejumlah RM16,300 sebagai separuh daripada keuntungan yang diperoleh daripada pelupusan harta perkahwinan dikenali sebagai Lot 4.31, 4.32 and 4.33, Level 4, Wisma Central, Kuala Lumpur; dan (vii) sejumlah RM90,000 iaitu separuh daripada nilai kereta iaitu Mercedez Benz. Semasa perbicaraan, responden memberitahu mahkamah bahawa dia bersetuju untuk mengetepikan perintah yang dinyatakan di dalam perenggan (iv), (v), (vi) dan (vii). Isu-isu di hadapan mahkamah ini adalah sama ada hakim bicara betul dalam membuat perintah seperti yang di atas dan sama ada alasan atau asas

yang sah wujud untuk mewajarkan mahkamah ini campur tangan dengan perintah-perintah yang telah dibuat.

Diputuskan:

(1) Atas sebab aliran masa dan peristiwa-peristiwa yang telah berlaku, tidak ada gunanya lagi untuk mengganggu perintah berkaitan dengan penjagaan, jagaan dan kawalan anak-anak kerana anak-anak telah mencapai umur dewasa (lihat perenggan 10).

(2) Jelas tidak ada alasan atau asas yang mewajarkan mahkamah ini campur tangan dengan kuantum yang diawardkan sebagai nafkah kepada anak-anak semasa anak-anak di bawah jagaan dan kawalan pempetisyen isteri. Rekod menunjukkan bahawa responden memang jelas biasa mempunyai tunggakan bagi perintah nafkah yang dikeluarkan oleh mahkamah terhadapnya (lihat perenggan 16).

(3) Responden suami, sebagai penjaga, jelas berterusan mengambil berat tentang kebajikan anak-anak walaupun mereka telah mencapai umur dewasa. Dia telah dengan sewajarnya sebagai bapa yang bertanggungjawab dan patuh membayar perbelanjaan pengajian anak-anak pada masa mereka tidak berupaya secara kewangan untuk menanggung perbelanjaan tersebut, tetapi ia tidak boleh dinafikan bahawa perbelanjaan tersebut adalah untuk faedah dan kepentingan utama anak-anak. Jika bayaran nafkah (sementara atau sebaliknya) adalah terlalu membebankan kepadanya, terdapat cara lain bagi responden suami memohon untuk variasi perintah tersebut (lihat perenggan 17).

(4) Dalam menjawab petisyen perceraian, responden suami tidak membantah rumah perkahwinan dipindah milik kepada isterinya tanpa beban. Selanjutnya, keterangan dalam rekod menunjukkan bahawa responden suami jelas mempunyai wang untuk menebus hartanah tersebut yang dia telah cagarkan sebagai sekuriti untuk pinjaman pada tahun 1994 jika dia hendak berbuat demikian. Dia mempunyai wang simpanan tetap sejumlah RM484,235.40 yang didaftarkan atas namanya (lihat perenggan 27–28).

(5) Perintah Mahkamah Tinggi bertarikh 15 September 2003 memerlukan responden suami untuk memindah milik rumah perkahwinan kepada isteri tanpa beban. Responden suami tidak pernah menuntut bahawa dia berhak kepada separuh bahagian dalam hartanah tersebut kerana ia diperoleh daripada hasil usahanya sendiri. Jika hartanah tersebut telah dipindah milik kepada isteri pada 2003 seperti yang diperintahkan, persoalan nilai hartanah tersebut pada hari ini tidak akan berbangkit. Nilai semasa rumah tersebut oleh itu adalah tidak relevan bagi perintah

yang dibuat pada 2003 yang mana responden suami mencuba mengecewakannya dengan membenarkan hartanah tersebut dilelong (lihat perenggan 31).

(6) Berkaitan dengan wang dalam akaun simpanan tetap, tidak ada alasan munasabah untuk mahkamah ini campur tangan dengan keputusan hakim Mahkamah Tinggi berkaitan dengan isu ini dan bersetuju dengan alasannya dalam mencapai keputusan yang dibuatnya (lihat perenggan 36).

(7) Berkaitan dengan separuh bahagian RM54,723.05 mewakili pelaburan yang dibuat oleh responden suami dalam pasaran saham berjumlah RM27,361.52, responden suami tidak mengemukakan apa-apa hujahan mengapa perintah ini patut diketepikan. Perintah ini oleh Mahkamah Tinggi dengan itu disahkan (lihat perenggan 39).

(8) Hakim bicara dalam memerintahkan separuh award Mahkamah Perusahaan yang diberikan memihak kepada responden suami dibayar kepada pempetisyen isteri tidak mengambilkira fakta bahawa pempetisyen isteri sendiri telah dibayar pampasannya berjumlah RM46,695.02 yang diberikan oleh Mahkamah Perusahaan. Dalam membuat tuntutan kepada separuh bahagian award responden suami, jumlah yang mana pempetisyen isteri sendiri telah terima patut diambil kira dan jumlah keseluruhan kedua-dua award Mahkamah Perusahaan dikongsi sama rata. Kesimpulannya adalah jumlah yang diawardkan kepada pempetisyen isteri berkaitan dengan item ini dibezakan kepada jumlah yang dikurangkan sebanyak RM56,000 (lihat perenggan 42–43).]

Notes

For cases on appeal against ancillary orders, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3613–3614.

Legislation referred to

Evidence Act 1950 s 114(g)
Law Reform (Marriage and Divorce) Act 1976 s 76

Appeal from: Divorce Petition No S8(53)–33–1275 of 1998 (High Court, Kuala Lumpur)

Joseph Iruthayam (Joseph Iruthayam & Co) for the appellant.
Fong Teng Foon (Yusuf Khan & Fong) for the respondent.

Zaleha Zahari JCA:

[1] Unless expressly stated, in this judgment, reference to any legal provision

refers to the Law Reform (Marriage and Divorce) Act 1976 whilst parties will be cited as they appear in the High Court.

[2] At the outset of hearing En Joseph Iruthiyam, counsel for respondent husband ('the appellant in these three appeals'), withdrew Civil Appeal No W-02–1095 of 2004. Thereafter, upon En Fong Teng Foon, counsel for the petitioner wife ('the respondent in these appeals'), informing us that Civil Appeal No W-02–365 of 2004 was redundant by reason of the events that had transpired since this appeal was first lodged, En Joseph also withdrew Civil Appeal No W-02–365 of 2004. In this situation we struck out Civil Appeal No W-02–1095 of 2004 as well as Civil Appeal No W-02–365 of 2004 and directed the deposit of the respective appeal as costs to the petitioner wife.

[3] Notwithstanding the striking out of these two appeals, in determining and in making a considered decision on the issues in respect of the third appeal, Civil Appeal No W-02–945 of 2003, it was still necessary for us to take into consideration the facts held out in the record of Civil Appeal No W-02–365 of 2004, (the respondent husband's appeal against court order dated 18 March 2004) by reason of the fact that it amended court order dated 15 September 2003, which is the subject matter of the order under appeal in W-02–945 of 2003. It was also necessary for us to take into consideration the facts in the record of Civil Appeal No W-02–1095 of 2004 (the respondent husband's appeal against the decision of the High Court dated 30 September 2004 in allowing the petitioner wife's application to allow execution of part of court order dated 15 September 2003) as it has a bearing on the transfer of the matrimonial home, one of the assets in issue in Civil Appeal No W-02–945 of 2003.

[4] The background facts are these. Parties were married on 3 March 1984. They have two children, a son, Lim Hon Chen born on 2 July 1986, and a daughter, Lim Sien Kim born on 17 November 1988. The petitioner wife filed a divorce petition in 1998. The decree nisi was pronounced some three years later on 1 August 2001.

[5] Civil Appeal No W-02–945 of 2003 is directed against the decision of High Court dated 15 September 2003 which was as follows:

(a) the guardianship of the children was given to the respondent husband whilst care, custody and control is given to the petitioner wife with reasonable access to the respondent husband;

(b) the respondent husband to pay maintenance of RM2,000 per month for

the children commencing the month of October 2003 to be paid on or before the 7th of the following month;

(c) the respondent husband to pay arrears of maintenance of RM54,000 to the petitioner wife;

(d) the respondent husband to transfer house No GM 692, Lot 24240 (PT 526) Mukim Batu, daerah Kuala Lumpur, Wilayah Persekutuan bearing address No. 20, Jalan Selama Satu, Taman Rainbow, Batu 4, 51100 Kuala Lumpur (ie matrimonial home) to the petitioner wife free from any encumbrances;

(e) the respondent husband to pay to the petitioner wife:

i the sum of RM242,117.70 being half of the sum of RM484,235.40 kept as fixed deposit in the name of the respondent;

ii the sum of RM27,361.52 being half of the value of shares in the respondent husband's name;

iii the sum of RM79,339.56 being half of the judgment sum of RM158,679.13 awarded to both of them by the Industrial Court dated 16 July 1998;

iv the sum of RM54,000 being half of the sum of RM108,000 being the proceeds after the sale of matrimonial asset at No 23, Jalan 7/153A, Taman Angkasa, Batu 61/2, Jalan Puchong, Kuala Lumpur;

v the sum of RM9,000 being half of the proceeds of disposal of matrimonial asset known as Lot 4.44, Level 4, Wisma Central, Kuala Lumpur;

vi the sum of RM16,300 being half of the gain arising from the disposal of matrimonial asset known as at Lots 4.31, 4.32 and 4.33, Level 4, Wisma Central, Kuala Lumpur;

vii the sum of RM90,000 being half of the value of the car ie Mercedes Benz 300SE bearing No WCY 7857.

[6] The arguments presented against these orders will now be dealt with in turn.

PARAGRAPH (A): GUARDIANSHIP, CARE, CUSTODY AND CONTROL OF THE CHILDREN

[7] According to the court order, the father retained guardianship of the children whilst care, custody and control of the children was awarded to the mother.

[8] Since the order was first issued it is not disputed that the mother did in fact have the care, custody and control of the children. This is clearly evident by reason of the fact that the petitioner wife had filed an application for arrears of maintenance for the children which issue will be dealt with subsequently in this judgment.

[9] As for the father, in the events that had transpired, from the evidence on record, he clearly had played his role as guardian. The fact that the respondent husband continued to be responsible and had met the expenses of the children's education after they had attained 18 years of age was relied on as a basis for this court to excuse him from complying strictly with some of the other orders made against him. On the date of hearing of these appeals we were informed that the son, Lim Hon Chen, was 24 years old, whilst the daughter, Lim Sien Kin, was 22 years old.

Decision

[10] By reason of the passage of time and events that had transpired we are of the view that no useful purpose would be served to disturb this order by reason of the children having attained the age of majority. We accordingly made no order on this issue.

PARAGRAPH (B) AND (C): MAINTENANCE OF CHILDREN AND ARREARS OF MAINTENANCE

[11] On this issue we note that the petitioner wife had via application in encl (14) dated 24 May 2000 (ie before the pronouncement of the decree nisi) applied for the interim order of maintenance for the children of RM24,000 for the period September 1998 to April 2000 which was then in arrears, and a sum of RM1,200 per month from May 2000 with liberty to apply. In her affidavit the petitioner wife contended that she had taken care of the children without any contribution from the respondent husband during this period. The record shows that the High Court judge had, on 18 October 2000, ordered encl (14) to be adjourned to be heard at the hearing of the divorce petition. In the meantime the court directed the respondent husband to pay the petitioner wife a sum RM1,000 a month as maintenance for the children from October 2000.

[12] The record shows as at September 2003, the respondent husband was in arrears of maintenance for the children in the sum of RM25,000 pursuant to order dated 18 October 2000 as well as in arrears of RM30,000 in respect of the order of maintenance for the period September 1998 to April 2000. According to the petitioner wife the total maintenance in arrears as at September 2003 was RM55,000.

[13] The record also shows that, arising from an appointment with the learned High Court judge (where both parties and their respective counsel were present) on 27 August 2004, it was by consent agreed that the maintenance order for the children be varied. The respondent husband was directed to pay the petitioner wife RM2,000 per month from October 2003, as maintenance for the two children on or before the 7th of each month and the respondent husband was to pay the arrears of maintenance amounting to RM30,000 plus RM24,000, making a total sum of RM54,000.

[14] The arguments presented on behalf of the respondent husband before us as to why this particular order should be set aside was this. The court ought not to order strict compliance of the maintenance order of RM2,000 per month and the arrears of maintenance for the children as the respondent husband had borne the expenses of the children's tertiary education after they had attained 18 years of age, which, according to his calculation, amounted to RM142,000. It was also contended that the maintenance order of the children need not be strictly enforced by reason of the matrimonial home having been registered solely in the petitioner wife's name. The circumstances leading to the registration of the matrimonial home in the petitioner wife's name will be dealt with subsequently in detail in this judgment when we deal with the issue whether the judge was right in ordering the matrimonial home to be given to the petitioner wife.

[15] Another reason advanced why this court ought not affirm and require strict compliance of the High Court order was by reason of the petitioner wife herself running a successful business and should forego this claim of arrears of maintenance of the children which the court had awarded.

Decision

[16] In making a considered decision on this issue we note that there was no appeal lodged by the respondent husband against the interim award of maintenance for the children. We further note that the maintenance order agreed to on 27 August 2004 was one by consent. It was not the respondent husband's case that the amount awarded by the learned judge as maintenance (be it interim or otherwise) for the children was excessive. In this situation there is clearly no valid reason or basis warranting us to interfere with the quantum

awarded as maintenance for the children during the period the children were under the petitioner wife's care, custody and control. The record shows in the events that had transpired, the respondent husband clearly was habitually in arrears of the maintenance orders issued by the court against him.

[17] As to whether, by reason of the respondent husband having met the expenses of the tertiary education of the children after they attained 18 years of age, constituted good reason for this court to exempt him from paying the amount due as arrears in maintenance prior to this period, we are of the following view. The respondent husband, as guardian, clearly continues to have an interest in the children's welfare even after they attain the age of majority. He had very properly as a responsible and dutiful parent met the educational expenses of the children at a time when they were financially incapable of meeting those expenses, but it must not be overlooked that the expenses were for the benefit and best interest of the children. We do not see on what basis the respondent husband can, after having voluntarily paid those expenses, ask the court to excuse him form complying with the peremptory orders of court during the period when the children were minors. If the maintenance payments (interim or otherwise) were too much of a burden on him, there were avenues open to the respondent husband to apply to vary those orders.

[18] Thus, the order of maintenance in para (b) of the order of RM2,000 per month for the children from October 2003 is affirmed. Likewise, the order in relation to the arrears of maintenance in para (c) amounting to RM54,000 is also affirmed.

PARAGRAPH (D): THE MATRIMONIAL HOME

[19] The matrimonial home was situated at No 20, Jalan Selama Satu, Taman Rainbow, Batu 4, 51100 Kuala Lumpur held under Issue Document of Title GM692, Lot 24240, Mukim Batu, in the District Kuala Lumpur, Wilayah Persekutuan. The learned judge had directed this property to be transferred to the petitioner wife free from all encumbrances.

[20] In making a considered decision on this issue we took into consideration the following. The record shows that the matrimonial home was acquired at a purchase price of RM180,000 in 1989. It was charged to United Asian Bank in respect of a loan of which the monthly installment of RM1,187 was met by the respondent husband. The matrimonial home was free from encumbrances by 5 December 1992.

[21] On 26 May 1994 the respondent husband charged the matrimonial home to Public Finance Bhd ('PFB') for a loan of RM180,000. There was no evidence adduced by the respondent husband to account for this 1994 loan.

This 1994 Loan was in arrears of about RM210,000 resulting in the matrimonial home being liable to be auctioned on the application by PFB.

[22] About a month after the issuance of the court order dated 15 September 2003 directing the respondent husband to transfer this property to the petitioner wife free from encumbrances, by reason of the respondent husband's default of the 1994 loan (and consequent upon another High Court having issued an order for sale of the said property by way of public auction) the matrimonial home was scheduled for auction on 27 October 2003. The auction of the matrimonial home was however adjourned by reason of absence of any bidder on the auction date.

[23] We understand the position of the matrimonial property as at 7 September 2004 to be this. The respondent husband did not take any step to redeem the matrimonial home which was then liable to be auctioned. Neither did he execute the transfer documents to the petitioner wife pursuant to court order dated 15 September 2003.

[24] In view of the order for sale of matrimonial home the petitioner wife was prepared to apply for a loan equivalent to the outstanding sum payable to PFB, for the auction to be cancelled, and to recover the outstanding sum from the respondent husband as a debt after the matrimonial home had been transferred to her absolutely. It is common ground that thepetitioner wife had charged the matrimonial home to Public Bank Bhd for a loan to redeem the property from Public Bank Bhd at around RM350,000.

[25] The respondent husband contended that the learned judge had failed to consider the order for sale dated 7 April 2003 granted by another High Court judge, when directing the respondent husband to pay the redemption sum to PFB within seven days from the service of the order even though he did not have the financial means to redeem the said property within the stipulated period.

[26] The respondent husband further contended that as at the date of hearing of this appeal he was entitled to 50% of the value of the matrimonial home. According to him as a spouse, he is entitled to half share of the matrimonial property, or more, if the property was acquired from the sole effort of that particular spouse. He contended that the current market value of the property is approximately RM1,000,000. But for the private caveat lodged by the petitioner wife, the property would have been sold long ago and he would have paid the proceeds to the petitioner wife but, conditional upon her forgoing all other awards.

Decision

[27] We note that in answer to the divorce petition dated 15 October 1999,

A the respondent husband did not object to the matrimonial home being transferred to the petitioner wife free from encumbrances.

[28] The respondent husband's contention of not having the means to redeem the matrimonial house which he had charged in respect of the 1994 B loan is clearly contrary to his obligation to transfer the matrimonial property to the petitioner wife free from encumbrances. This contention is also not supported by the evidence as he had fixed deposits amounting to RM484,235.40 registered in his name. The evidence on record shows that the respondent husband clearly had the means to redeem the said property which C he had charged as security for the 1994 loan had he wanted to do so.

[29] As to whether the respondent husband's claim to a half share of the current market value of the said property (which according to him is RM1,000,000) and the amounts due from him in respect of the order of D maintenance for the children and other sums should be set-off against this claimed half share, we take the view that in the circumstances of this case, as well as the respondent husband's conduct, does not warrant us taking such a position.

E

[30] The issuance of the order of sale by way of public auction by a different court arising from the respondent husband's default in respect of the 1994 loan a month after issuance of the court order dated 15 September 2003 directing the respondent to transfer the matrimonial property to the petitioner wife, in F our considered opinion, is now rendered academic by reason of the fact that the matrimonial home has been registered in the petitioner wife's name by reason of she herself redeeming the said property from PFB of the 1994 loan by taking a loan in her own name.

G **[31]** We are of the firm view that the respondent husband is not entitled to what he seeks. The relevant date is 15 September 2003, when the court ordered that the matrimonial home be transferred to the wife free of all encumbrances. Such an order was made because the respondent husband did not object to it in his answer. He never took the position then that he was entitled to a half share H of the property as it was acquired from his sole efforts. If the property had been transferred to the wife in 2003 as ordered, the question of what the property is worth today would not arise at all. The present day value of the house is therefore irrelevant to the order made on 15 September 2003 which the respondent husband had tried to frustrate by allowing the property to be put I up for auction.

[32] For the above reasons, we see no valid reason to interfere with the decision of the High Court judge on this issue. The order in respect of the matrimonial home of the High Court judge is accordingly affirmed.

PARAGRAPH (E)(i) HALF OF THE FIXED DEPOSIT OF RM484,235.40

[33] The petitioner wife claimed a half share of the fixed deposit registered in the respondent husband's name, which claim was allowed by the High Court judge. It was not disputed that all the monies in the fixed deposit accounts listed in para 13(b) of the petition totaling RM484,235.40 were in the sole name of the respondent husband.

[34] The respondent husband's case was that the sums deposited in his name did not belong to him but were in his name for reasons of expediency for certain companies and the learned judge fell into error by including these sums as matrimonial assets. The reason given by the learned judge to award half of this sum to the petitioner wife 'irrespective of whether the respondent husband lost it or otherwise as he is holding the money in trust for the petitioner wife' is untenable in law as he disregarded the status of the money.

[35] The High Court judge in his grounds of decision stated that as the said sum of RM484,235.40 were acquired during the course of the marriage it was available for distribution under s 76. The court did not accept the explanation given by the respondent husband without full particulars being furnished to the court, in particular the movement of the money in the fixed deposit accounts. The High Court finding was that the respondent husband is the ultimate beneficiary of the interest in the company/companies involved in the fixed deposit accounts.

Decision

[36] We see no valid reason for interference with the learned High Court judge's decision on this issue and agree with his reasoning in arriving at the decision which he did.

PARAGRAPH (E)(ii): HALF OF RM54,723.05 REPRESENTING INVESTMENTS MADE BV THE RESPONDENT HUSBAND IN THE STOCK MARKET AMOUNTING RM27,361.52

[37] The respondent husband initially denied having shares in the K&N Kenanga Sdn Bhd but later agreed this denial to be untrue when confronted with copies of statement and contract notes issued by K&N Kenanga Sdn Bhd of his share transactions. The respondent husband then admitted the share transactions but claimed that those monies were lost eventually without tendering any evidence.

[38] The High Court judge in his grounds of decision stated that the

respondent husband's evidence is not credible, and invoked an adverse inference under s 114(g) of the Evidence Act 1950, and ordered a half share to the petitioner wife.

Decision

[39] We dismiss the appeal against this particular order as counsel for the respondent husband had not presented any argument as why this order should be set aside. This order of the High Court is accordingly affirmed.

PARAGRAPH(E)(iii): HALF SHARE OF THE INDUSTRIAL COURT AWARD DATED 16 JULY 1998 IN FAVOUR OF THE RESPONDENT HUSBAND

[40] The petitioner wife claimed to be entitled to a half share of the Industrial Court award dated 16 July 1998 in favour of the respondent husband for the sum of RM158,679 (ie RM79,339.56). This claim was allowed by the High Court judge.

[41] We note that both the petitioner wife and respondent husband had taken action against Pan Global Insurance Sdn Bhd ('Pan Global') for wrongful termination of their employment asmarketing field officers. In 1998 the Industrial Court had made an award in favour of both the petitioner wife and the respondent husband. The petitioner wife was paid her compensation in 1998. Be that as it may, in respect of the award made in favour of the respondent husband, Pan Global had applied for judicial review of this award to the High Court. We note that the application for judicial review of the Industrial Court award by Pan Global had been dismissed by the High Court. Thereafter on appeal to the Court of Appeal, Pan Global's appeal was also dismissed. Following the Court of Appeal dismissal of Pan Global's appeal, only then was the award held by the respondent husband solicitors released to him ie sometime in 2006.

Decision

[42] The learned judge in ordering half of the award granted in favour of the respondent husband to be paid to the petitioner wife did not take into consideration the fact that the petitioner wife herself was paid her compensation RM46,965.02 granted by the Industrial Court. In our view, in making a claim to a half share of the respondent husband's award, the amount which the petitioner wife herself received must necessarily be taken into account, and the total sum of the two Industrial Court award be shared equally.

[43] The end result is that, the sum awarded to the petitioner wife in respect of this item was varied to a reduced sum of RM56,000.

PARAGRAPHS E(iv), (v), (vi) AND (vii)

[44] In the course of hearing, counsel for the petitioner wife informed us that the petitioner wife was prepared to forego the orders specified in paras e(iv), (v), (vi) and (vii) in respect of the respective properties specified therein made in her favour and that they all be set aside.

Decision

[45] By consent, the orders in paras e(iv), (v), (vi) and (vii) of the order was set aside.

CONCLUSION

[46] To conclude, the High Court judge's order dated 15 September 2003 as amended by order dated 2 December 2008, was affirmed/varied as follows:

(a) Paragraph (a): No order.

(b) Paragraph (b) and (c): Affirmed.

(c) Paragraph (d): Affirmed.

(d) *Paragraph (e)*

(i) Order in para e(i) affirmed;

(ii) Order in para e(ii) affirmed;

(iii) Order in para e(iii) is varied by substituting for the sum 'RM79,339.56' with a reduced sum of 'RM56,000.00';

(iv) By consent, order set aside;

(v) By consent, order set aside;

(vi) By consent, order set aside;

(vii) By consent, order set aside.

[47] Costs of appeal W-02–945 of 2003 fixed at RM12,000 to the petitioner wife. The deposit to petitioner wife to account of costs.

Order accordingly.

Reported by Ashgar Ali Ali Mohamed